SUPREME COURT, U. S.

No. 73-1359

APR 22 19

MICHAEL RODAK, J

In the Supreme Court of the United States

OCTOBER TERM, 1973

HENRY I. SIEGEL CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The court of appeals issued no opinion. The Board's decision and order (Pet. App. 16-50) are reported at 202 NLRB No. 125.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1973 (Pet. App. 15). The petition for a writ of certiorari was filed on March 8, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the company violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging three employees because of their union activities.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3.

STATEMENT

The Board found that petitioner Company violated Section 8(a)(3) and (1) of the Act by discharging employees Willis Hicks, James Foster, and Thomas Presson because of their union activities (Pet. App. 46). The Board also found that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees concerning their union activities and sympathies, by creating the impression of surveillance of employees' union activities, and by threatening employees with loss of employment if they selected union representation (Pet. App. 22, 27). The court below sustained the Board's findings (Pet. App. 15). Petitioner challenges only the finding that the discharges of Hicks, Foster, and Presson were unlawful. The evidence relevant to that finding is as follows:

The Company, a clothing manufacturer with a large distribution center in Bruceton, Tennessee, transports goods between its various manufacturing plants and the distribution center in its own trucks (Pet. App. 19; A. 33-35, 38, 112-113).[1] In late July or early August 1971,[2] a local of the Teamsters Union (the Union) began an organizing campaign among the Company's twelve drivers and four mechanics. This culminated in a Board election on October 21, which the Union lost by a vote of ten to six (Pet. App. 20; A. 14, 16, 61, 80).

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[1]"A." refers to the appendix to the briefs in the court of appeals.

[2]All dates hereafter are in 1971.

Thomas Hicks signed a union authorization card, solicited other employees for the Union, attended three union meetings, including one at his home, and acted as the Union observer at the election (Pet. App. 29; A. 80, 83, 94). James Foster signed a union authorization card and attended two union meetings, and Thomas Presson signed an authorization card and attended one union meeting (Pet. App. 28-29; A. 39, 44). Hicks was the Company's senior driver with ten years of service, seven as a driver (Pet. App. 29; A. 79). Foster and Presson had driven for the Company six and five years, respectively (Pet. App. 29; A. 39, 61). All three employees had good work records (Pet. App. 29; A. 22, 39, 65, 85, 204).

On or about August 17, petitioner's vice president Sam Siegel called Hicks into his office and asked, "What's going on among the truckers?" (Pet. App. 22; A. 15, 80, 115). When Hicks responded by asking if Siegel had heard anything, Siegel said he had heard that the drivers had signed union authorization cards (Pet. App. 22; 80-81). Hicks conceded that cards had been signed, and Siegel asked, "Why did you sign the cards and what do you expect to gain by it?" (Pet. App. 22; A. 81).

Later that day, Hicks was asked to return to Sam Siegel's office to relate to Jesse Siegel, petitioner's president, what he had told Sam Siegel earlier (Pet. App. 23; A. 82, 105). Hicks repeated that he and other drivers had signed union cards (Pet. App. 23; A. 82). Jesse Siegel then asked Hicks why the men did not quit if they were dissatisfied (Pet. App. 23; A. 82). Sam Siegel added that employees could lose their jobs because of the union activities, asked Hicks where he would get another job if he lost this one, and told him, "If you stick your neck out you are liable to get it chopped off" (Pet. App. 23; A. 82).

In early September, Foster was called to Sam Siegel's office and informed that Siegel understood that a carload of employees had gone to a meeting concerning the

Union (Pet. App. 20-21; A. 63). When Foster admitted that this had occurred, Siegel stated, "I guess you know that could mean your job if you people vote the union in" (Pet. App. 21; A. 63). Toward the end of September, Supervisor Jesse Ross asked Foster not to vote for the Union, telling him that the Union "was going to put some people out of jobs" and that he did not want to see Foster "hurt" (Pet. App. 21; A. 64, 161). Ross informed Foster that he "had been told by the higher officials that some was going to lose their jobs" (Pet. App. 21; A. 73).

Petitioner's drivers traveling between its Gleason, Tennessee plant and its plants northwest of Gleason frequently stopped for coffee breaks and lunch at a restaurant in Gleason called the "Crestview Drive Inn" (Pet. App. 28; A. 42, 45, 68, 90, 159). Petitioner's vice president Klein Thornton, in charge of the trucking operation, had been aware of the drivers' longstanding practice for at least two years (Pet. App. 28, 32; A. 125, 134). The drivers had never been reprimanded for their practice of taking coffee breaks at the Crestview (Pet. App. 28, 37-38; A. 41-42, 65, 70, 85, 195). Thornton had petitioner's security manager, Hollingsworth, place the restaurant under surveillance from June to mid-August 1971 (Pet. App. 28, 32; A. 126, 139). Hollingsworth timed the stops of the eight or nine drivers who regularly stopped at the Crestview, noting that they took coffee breaks for periods ranging from twelve minutes to more than one hour (Pet. App. 36; A. 143). Hollingsworth's investigation was discontinued in August because of the impending Board election, but was resumed in November after the election (Pet. App. 32-33; A. 126-127).

On the morning of December 9, Supervisor Ross assigned Hicks, Foster, and Presson to routes that would take them through Gleason (Pet. App. 34-35; A. 54, 83, 177-178). No other drivers were dispatched on such a route (Pet. App. 35; A. 185-186). Ross and Hollingsworth arrived at the Crestview before the three drivers, and parked across the road from the restaurant (Pet. App. 35; A. 144-146). Shortly thereafter, Hicks and Presson stopped their trucks and entered the restaurant, followed ten minutes later by Foster (Pet. App. 29-30; A. 50-51, 65, 83, 146, 166).

When the drivers left the restaurant, after having spent from fifteen to forty minutes there,[3] Ross told them that they were fired—that he "had orders to fire [the men] on the spot when [he] caught [them] stopped" (Pet. App. 29-31; A. 64, 84, 147, 168). Ross added that he knew other drivers also stopped at the Crestview, some for longer periods, but that Hicks, Foster, and Presson had been fired because they were the only drivers "caught stopped" (Pet. App. 29-30, 31, 36; A. 66-67, 150). Upon returning to Bruceton, the three men were told by Sam Siegel that they were not entitled to take lunch or coffee breaks because they were paid "straight through" (Pet. App. 30-31; A. 43, 56, 67, 87). Petitioner did not warn, discipline, or discharge any other drivers for stopping at the Crestview after the discharges of Hicks, Foster, and Presson (Pet. App. 44; A. 186-187).

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[3]The administrative law judge found it unnecessary to resolve the conflicting testimony on this issue (Pet. App. 45, n. 13).

The administrative law judge concluded that the General Counsel had established "a strong prima facie case that the discharges were illegally motivated" (Pet. App. 38).[4] The administrative law judge further found that the Company had not overcome this showing of illegal motivation, for its "explanation of its actions is not credible" (Pet. App. 39).[5] The Board adopted the administrative law judge's findings and held that the discharges of Foster, Hicks, and Presson violated Section 8(a)(3) and (1) of the Act. It ordered the Company to reinstate them with back pay (Pet. App. 16-17; 46-49).

The court of appeals found that the Board's unfair practice findings were supported by substantial evidence, and enforced its order in full (Pet. App. 15).

ARGUMENT

The sole issue raised by the petition is whether there is substantial evidence to support the Board's finding that the actual motive for the discharges of Hicks,

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[4]Thus, he noted that "Hicks and Foster were known to have been active in the Union and Presson had also signed a union card and attended a union meeting with Foster"; the Company had "demonstrated its hostility to the employees' efforts to organize by Sam and Jesse Siegel's and Ross' statements to Foster and Hicks, going so far as to indicate to both of them that their union activities could cause them to lose their jobs"; all "three drivers * * * testified credibly that they had never been warned, reprimanded or disciplined during their many years of service"; and "the employees were discharged for doing something they and other drivers had been doing for years * * * and of which * * * [the Company] and everyone else were aware" (Pet. App. 38).

[5]He stated, *inter alia*, that "the drivers were fired allegedly for violating a company rule or policy [respecting coffee breaks] which I find did not exist" (Pet. App. 40).

Foster, and Presson was their union activities. That evidentiary issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, as we have shown, there is ample support in the record for the Board's finding.

The decision below is not in conflict with *National Labor Relations Board* v. *McGahey*, 233 F. 2d 406 (C.A. 5). The court there found no "substantial basis of believable evidence" pointing toward unlawful motivation in the discharge of two employees. *Id.* at 413. Here, by contrast, the court of appeals upheld the Board's finding that the Company had shown no credible explanation for the discharges to rebut the "strong prima facie case" of illegal motivation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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